

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration Between

Fraternal Order of Police, Lodge 5 :
: AAA Case No. 01-17-0005-9700
and : Grievance: Daniel Eckert Suspension
City of Philadelphia :
:

OPINION AND AWARD

Hearing Date: March 1, 2018

Arbitrator: Thomas P. Leonard, Esquire

Appearances:

Fraternal Order of Police, Lodge 5

Marc L. Gelman, Esquire
Jennings Sigmund

City of Philadelphia

Cara E. Leheny, Esquire
City of Philadelphia Law Department

Procedural History

The Fraternal Order of Police, Lodge 5 (FOP) and the City of Philadelphia (City) are parties to a collective bargaining agreement covering the wages, hours and terms and conditions of employment of the police officers employed by the City. The CBA contains a grievance procedure for disciplinary suspensions. The procedure involves several steps, culminating in arbitration pursuant to the rules of the American Arbitration Association.

On June 27, 2017, the FOP filed a grievance alleging that the City's two suspensions (for five days and for one day) of Officer Daniel Eckert were without just cause. The grievance proceeded through the steps of the procedure. On September 27, 2017, the FOP made a demand for arbitration with the American Arbitration Association. On November 8, 2017, the American Arbitration Association notified the undersigned that the parties had selected him as the arbitrator to hear this grievance.

The parties agreed to hold the arbitration on March 1, 2018 at the offices of the American Arbitration Association, 230 South Broad Street, Philadelphia, Pennsylvania. The hearing was held as scheduled, at which time the parties presented evidence, cross-examined witnesses and introduced documentary evidence. Following the hearing, the parties made closing arguments and the arbitrator closed the record.

Issue

Whether the five day suspension for Insubordination and the one day suspension for Neglect of Duty (Uniforms and Equipment) issued to Daniel Eckert were for just cause?

Facts

Officer Daniel Eckert has been a police officer with the Department for 10 years. He has been at the South Street mini station for 9 ½ years. The station is in a business corridor located within the larger Third District.

On January 30, 2016, at approximately 1:20 a.m., Eckert was patrolling the in the area of [REDACTED] as a back up to Officer H [REDACTED] A [REDACTED]. They received a call to investigate a possible breaking and entering at a barbershop [REDACTED] at [REDACTED], a barbershop. The caller said the barbershop was closed and its lights were out, but that it appeared to the caller saw what appeared to be people in the building with flashlights shining inside. When the officers arrived, they were met by two men whom the officers asked for identification and why they were there. The men refused to give their IDs. They were intoxicated. The men were argumentative and uncooperative with the officers. One man had keys to the building, but the officers could not conclude that he owned or rented the building because he would not provide identification. They repeatedly asked the officers why they were there. The officers replied that they were there in response to a radio call of people inside a store that was closed. The civilians accused the officers harassing them because they were African American. The two officers are white.

One of the civilians asked for the officers' supervisor come to the scene. Officer Eckert called for a supervisor. Within a few minutes, Lieutenant J [REDACTED] W [REDACTED] arrived.

W [REDACTED] was not the immediate supervisor of Eckert and A [REDACTED], but he responded because the officers' immediate supervisor, Sergeant D [REDACTED] C [REDACTED], was deployed at that moment elsewhere in the district.

When Lt. W [REDACTED] arrived he observed the civilians and the officers engaged in a loud exchange of voices. The civilians were not showing any cooperation.

Sergeant C [REDACTED] then arrived at the scene. He is African American. Eckert noted that with an African American officer on the scene, things should improve. In fact, there had been a noticeable lowering of the volume from the civilians. But Eckert's remark was followed with the men getting loud again. Lt. W [REDACTED] decided to de-escalate the situation and directed Eckert to his car across the street. Eckert left to sit in his car and began to take notes on the incident while the incident was fresh in his mind, as was his customary practice. A map of S. 4th Street shows that it is one-way street going in a northerly direction.

The men calmed down and they handed over their IDs, which allowed Officer A [REDACTED] to run a background check to verify that the one man was the owner and that they were lawfully on the premises and that there were no warrants for them. Then A [REDACTED], out of frustration, thanked the men "for their non-cooperation."

In response to A [REDACTED]'s remark, Lt. W [REDACTED] counseled A [REDACTED] "on location", telling her that it was not helpful to say something like that. She agreed with him and said that she would try to do better. He returned the men's IDs to them and then told them they could return to their business.

Lt. W [REDACTED] and Sgt. C [REDACTED] then walked across the street to go toward their individual cars. But before getting to the car, W [REDACTED] met with Sgt. C [REDACTED] on the corner of 4th and South Street to discuss what had just happened with the men at the barbershop. A [REDACTED] also appeared.

W [REDACTED] told both C [REDACTED] and A [REDACTED] that it was important not to allow citizens to bait officers into a confrontation and that it was important to avoid escalation. He also counseled C [REDACTED] that Eckert's interaction with the civilians was unprofessional and that C [REDACTED] needed to address that issue with Eckert either with counseling or discipline. This discussion took place about four to five feet from Eckert's car.

W [REDACTED] also noted that Eckert was wearing an unapproved knit skull cap and that his nameplate was not visible to the public, contrary to Department directives. The skull cap has PPD stitched into it, but it is not Department approved or issued.

The group then walked to their respective cars. W [REDACTED] car was parked in front of Eckert's car. As Lt. W [REDACTED] was getting into his car, which was right in front of Eckert's car, Officer Eckert, while sitting in the driver's side of the car, said to C [REDACTED], but loud enough for W [REDACTED] to hear, "I'm right here. Why does he have to have you tell me? I'm sitting right here." C [REDACTED] advised Eckert to "let it go," holding his hands up. Then Eckert again said "Sergeant, why does he have to have you tell me? Why can't he tell me I'm right here?"

At this arbitration hearing, C [REDACTED] testified that Eckert's comments were not appropriate and not respectful, especially since there were civilians across the street who could have heard the disagreements between an officer and a superior. Eckert was loud enough and close enough to W [REDACTED] for W [REDACTED] to hear him.

W [REDACTED] then came toward Eckert's car where he was still sitting and yelled at him "Who the fuck do you think you're talking to. Don't act like I'm fucking scared of you." Then he told Eckert that the knit skull cap was not department approved and that he was not wearing a department issued nameplate. When Eckert's shift began at 11:00 p.m. his nameplate was on his shirt and was visible. But as the night grew colder, he put on a jacket and he did not move the

nameplate to the outer garment. At this arbitration, W [REDACTED] admitted that he was angry at Eckert's conduct in disrespecting the chain of command. He also testified that in his six years as a supervisor he had never written up an employee for discipline before Eckert.

C [REDACTED] directed Eckert back to the South Street mini station, which order he obeyed. When Eckert's shift was over, he took his paperwork over to the District Offices. He also tried to find W [REDACTED] but W [REDACTED] had left the District for the night. Eckert testified in this arbitration that if W [REDACTED] had still been at the District office, he would have explained to him "that I did not mean to offend him" [W [REDACTED]] and that "my conduct with the gentlemen may have been out of line and that it was out of character for me." He would also have explained to him "that I was dealing with some personal matters that I did not make my supervisors aware of" involving [REDACTED]
[REDACTED]

After the shift, Lt. W [REDACTED] requested that Captain P [REDACTED] M [REDACTED], review the facts of the January 30, 2016 incident and charge Officer Eckert with the appropriate disciplinary violation. Captain M [REDACTED] assigned Lt. M [REDACTED] G [REDACTED], [REDACTED] to review the facts. Lt. G [REDACTED] interviewed the Eckert, A [REDACTED] W [REDACTED] and C [REDACTED] as well as Patrol Officer T [REDACTED] L [REDACTED] who had appeared on the scene with Sergeant C [REDACTED]. G [REDACTED] made a report recommending the charges had enough merit to be sent to the Police Board of Inquiry (PBI). On March 13, 2017, the PBI reviewed the case and recommended that the Commissioner impose a five day suspension for Insubordination and a one day suspension for Neglect of Duty. The Commissioner upheld the recommendation.

The two charges against Eckert are:

Article IV	Insubordination
Section 4-003-10	Profane, insulting, or improper language, conduct, or gestures toward, in the direction of, or in relation to a, a superior officer.
SPECIFICATION:	On Saturday, January 30, 2016, while working the 11:00 PM to 7:15 AM tour of duty, you responded to a radio assignment of suspicious activity at the barber shop located at [REDACTED] where you and Officer H [REDACTED] A [REDACTED] [# [REDACTED]] encountered three black males claiming to work at or own the establishment. During this investigation, a supervisor was requested by one of the males being investigated. Lieutenant J [REDACTED] W [REDACTED] # [REDACTED] responded and observed that engaged in a loud exchange of words with the males. Believing that your actions were escalating the incident, Lieutenant W [REDACTED] asked you to leave the area. Once the incident had de-escalated, Lieutenant W [REDACTED] was addressing Sergeant D [REDACTED] C [REDACTED] # [REDACTED] about your behavior and your uniform when you said loudly, in a confrontational tone, "He can say it to me," referring to Lieutenant W [REDACTED]. You repeated your insubordinate behavior by saying a second time in a similar tone, "He can come talk to me"
Article V	Neglect of Duty
Section 5-011-10	Failure to comply with any Police Commissioner's orders, directives, Memorandums, or regulations; or any oral or written orders of superiors.
SPECIFICATION	On Saturday, January 30, 2016, you responded to [REDACTED] for a radio assignment of suspicious activity at a barber shop. While on location, Lieutenant J [REDACTED] W [REDACTED] responded to a request for a supervisor. You were observed to be in violation of Directive 6.7. Uniforms and Equipment when you were noted wearing an unauthorized non-uniform skull cap. In addition, you were not wearing your nameplate on your outermost garment.

Discussion

The City, as the employer, bears the burden of proving that its discipline of Officer Eckert was for just cause.

City's Position

The City has proven all of the factors of the traditional just cause analysis for employee discipline cases. There are two separate charges, Insubordination and Neglect of Duty. The City has proven all of the factors of just cause for both charges.

As for the Insubordination charge, the rules and directives at issue in this case are clearly written. They have been given to the officers, so the officers are on notice. The City argues that the rules and directives are essential to the efficient and productive operation of police department where adherence to a chain of command is important. Before issuing the discipline, the Department took the time to verify that the rules and directives were violated. The Department assigned someone who was not involved in the incident, Captain W [REDACTED], to determine whether there was a violation. He interviewed all the participants in the action that gave rise to the discipline. His report supports the charges.

The facts show that Officer Eckert engaged in inappropriate tone, language and conduct when Officer Eckert interrupted Lt. W [REDACTED] talking with Sgt. C [REDACTED] on how the officers could have better handled the barbershop incident.

As for whether the charge was proven by substantial evidence, the City points out that at the arbitration hearing, Lieutenant W [REDACTED] gave credible testimony that Officer Eckert made an improper statement. Sergeant C [REDACTED] gave critical testimony that supported Lieutenant W [REDACTED] testimony. Officer Eckert admitting sitting in his car, but said that he merely asked a question. The City proved that the statement was an improper interference with the way Lieutenant W [REDACTED] chose to direct the officers to do their jobs and had the effect of interrupting the chain of command.

As for the Neglect of Duty charge, that Eckert violated Directive 6.7 by wearing an unauthorized skull cap and by not wearing his nameplate on an outer garment, the facts show that there really was no factual dispute, as Eckert admitted to the facts of this charge.

FOP's Position

Initially, the FOP stresses the importance of focusing on the discrete relevant facts which of this insubordination charge, i.e. his remarks to Lt. W [REDACTED], and not the facts which relate to his interaction with the civilians before Sgt. C [REDACTED] appeared. To try Officer Eckert for his conduct with the civilians would be a distraction and violate Eckert's rights to due process to defend charges for which he was put on notice.

The FOP argues that the City has not proven its case by substantial evidence because the City has not shown that Officer Eckert said anything or engaged in conduct that was intentionally insubordinate. The City has mischaracterized Eckert's statements being aggressive and confrontational when in actuality there was no edge at all to them. Furthermore, Eckert intended only to ask a question, which was consistent with his reputation of being an inquisitive police officer. Both Captain W [REDACTED] and Sergeant C [REDACTED] testified to this reputation.

The City did not prove that Eckert was intentionally insubordinate that night because he obeyed Lt. W [REDACTED] order to move across the street from the barbershop when Lt. W [REDACTED] asked him to do so. Also, he removed his unauthorized skull cap after Lt. W [REDACTED] had gestured to him to do so. Once Eckert understood what Lt. W [REDACTED] meant, he readily complied, without arguing, hardly a characteristic of someone who is insubordinate.

The FOP also argues that this alleged Code violation does not cover this situation because Eckert was directing his questions to his own superior, Sgt. Cole. Furthermore, even if W [REDACTED]

heard the questions, it would be unfair to discipline Eckert for how W [REDACTED] perceived the question because such an application of the Code to the situation would vary from case to case depending on the subjective opinion of the superior and not on an objective standard.

Conclusion

Arbitrators have commonly utilized a seven-factor test for determining whether an employer had just cause to discipline employees, and this test has been approved by Pennsylvania Courts in their review of arbitrator's awards. The test considers the following factors:

- (1) Did the employer give the employee forewarning of the possible disciplinary consequences of his or her conduct?;
- (2) Was the employer's rule or orders reasonably related to the orderly, efficient and safe operation of its business and the performance that the employer might properly expect of the employee?;
- (3) Did the employer make an effort to determine whether the employee in fact violated its rule or order?;
- (4) Was the employer's investigation conducted fairly and objectively?;
- (5) Did the employer obtain substantial evidence of the employee's violation?;
- (6) Has the employer applied its rules and penalties even-handedly to all employees?; and
- (7) Was the degree of imposed discipline reasonably related to the seriousness of the offense and the employee's work record?

Int'l Bhd. of Fireman & Oilers v. Township of Falls, 688 A.2d at 269, 271 (Pa. Commw. Ct. 1997,) (citing Am. Fed'n of State, County & Mun. Employees, Dist. Council 88 v. City of

Reading, 568 A.2d 1352 (Pa. Commw. Ct. 1990)). Using this analysis, just cause for discipline does not exist where any one of the above factors is not satisfied. Id.

Insubordination Charge: Section 4-003-10

A review of this charge focuses on the fifth factor of the just cause analysis, whether the employer obtained substantial evidence of the employee's violation.

Section 4-003-10 prohibits officers from using "language, conduct or gestures" toward superiors or in relation to superiors that are "profane, improper or insulting." Nothing that Eckert said that night was "profane." As for whether what Eckert said was "insulting" that word is an adjective to "language, conduct or gestures". The word "insult" itself is defined as a noun meaning "a gross indignity." (See Merriam-Webster.com). From my review of the evidence, nothing Eckert said rose to the level of a gross indignity.

That leaves us with analyzing whether Eckert's language or conduct was "improper" as set forth in the Disciplinary Code. Captain Gregory Melkowski, the Department's labor relations coordinator, explained that this section of the Disciplinary Code is one of three sections prohibiting insubordination. He testified that, unlike Section 4-002-10, which is a straightforward prohibition on disobeying orders, this section of the Code is to make sure that officers show respect to their superiors in the chain of command and do not stir up divisions in the command by challenging one superior's order in the presence of another superior.

For the following reasons, I must conclude that Officer Eckert was insubordinate in violation of Section 4-003-10.

The FOP is correct that Officer Eckert is not on trial for his conduct with the civilians. But those facts are part of this Opinion and Award to show the context of Eckert's questions. The questions came shortly after Lt. W [REDACTED] and Sgt. C [REDACTED] had brought calm to a situation that

was deteriorating and just moments after Lt. W [REDACTED] had counseled Officer A [REDACTED] on her conduct and after he had told C [REDACTED] to counsel Eckert on his conduct. The City's disciplined Eckert because he chose that time and place to raise the question of how Lt. W [REDACTED] decided to do his job as Sgt. C [REDACTED]'s superior.

Eckert was going out of the chain of command to make an implied criticism that Lt. W [REDACTED] acted improperly in not counselling Eckert directly at that moment. Eckert may dispute whether Lt. W [REDACTED] was the intended audience for that question, but it is hard to understand how Lt. W [REDACTED] could not have heard it since he was so close to Eckert. Lt. W [REDACTED] heard the questions and he was the wrong person to have to hear the questions at that time. W [REDACTED], with the help of Sgt. C [REDACTED], had just successfully concluded an investigation of two intoxicated, belligerent civilians that had been started by Eckert and A [REDACTED] but was at a stalemate.

As for the FOP's argument that the City has mischaracterized Eckert's questions to put them in the best light for the City, I do note that the witnesses offered slightly different versions of what Eckert said. However, Sergeant C [REDACTED]'s testimony in this arbitration was persuasive. He is in the difficult position of testifying against an officer whose work he respects and with whom he has shared a longtime shift assignment. Sergeant C [REDACTED] testified that he likes Officer Eckert's work and likes supervising him.

But he testified in a straightforward manner in this arbitration that his questions were inappropriate. The testimony corroborated his report to Lt. G [REDACTED] shortly after the incident that Eckert's remarks were disrespectful and unprofessional. The very night of the incident Sgt. C [REDACTED] advised Eckert to "let it go."

The City answered the FOP's argument that Eckert did not have the intention to be insubordinate in asking the questions because in the same incident he obeyed two of W [REDACTED]

other orders. However, the same employee can be both obedient and insubordinate at different times on the same shift. Accordingly, the argument put forth by the FOP is not entirely persuasive. Furthermore, a paramilitary organization like the department has a right to expect its officers to refrain from insubordinate behavior at all times.

Finally, the City addresses the FOP's argument that it would be unfair to find that Eckert was insubordinate based on the subjective opinion of Lt. W [REDACTED] that the questions were improper. The City's witnesses convinced me that this charge is based on more than one superior being upset and applying his subjective feelings to the situation. There is no question that Lt. W [REDACTED] was angry at Eckert. He admitted that he was angry. But looking at the situation objectively, I must conclude, based on the totality of the evidence, that Officer Eckert's questions, made at that time and place, were "improper" and constituted Insubordination under Section 4-003-10 of the Disciplinary Code. Eckert's questions called into doubt the way that Lt. W [REDACTED] chose to exercise his command over Sgt. C [REDACTED] as to telling his officers how to act in such situations. He did so while Sgt. C [REDACTED] was still there. It was disrespectful of the chain of command, a key element to the operation of a para military organization that is the police department.

Failure to Comply with Directive Charge - Section 5-011-10

Under Section 5-011-10 of the Disciplinary Code, the Department may discipline an officer for Failure to Comply with any Police Commissioner's orders, directives, memorandums, or regulations; or any oral or written orders of superiors.

At issue here is Directive 6.7, Uniforms and Equipment, which prohibits wearing “unauthorized non-uniform clothing” and requires wearing the officer’s nameplate on his or her outermost garment at all times. The skull cap was unauthorized. Eckert’s nameplate was not on his jacket that night.

The City proved that it has issued Directive 6.7 to all officers, including Officer Eckert. As for the “non-uniform clothing” Officer Eckert admitted to wearing the skull cap. It did have PPD on it, but it was not authorized by the City. As for the nameplate, Eckert explained that it was on his shirt but that he had covered up the shirt when he stepped out into the cold night to put on his jacket. Therefore, he violated two parts of Directive 6.7, which gave the City just cause to discipline him.

However, the issue regarding this charge focuses on the seventh factor in the just cause analysis discussed above, whether the discipline is reasonably related to the seriousness of the offense and the employee’s work record.

Unlike the Insubordination Charge, which mandates a five day suspension for a first offense, the disciplinary code does allow a range of discipline, beginning with a reprimand, for a first violation of a failure to follow a directive order. Such a range of penalties is a standard policy of progressive discipline for many workplaces. This appears to be Eckert’s first violation of the Clothing and Equipment Directive. The City has not proven that there was just cause to give him a one-day suspension instead of a reprimand, a level of discipline for a first offense that would be consistent with a policy of progressive discipline. The penalty should be reduced to a reprimand.

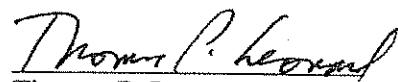
Award

The grievance is denied in part and sustained in part.

The grievance is denied with regard to the Insubordination charge.

The grievance is sustained with regard to the Neglect of Duty charge, the failure to follow Directive 6.7. The one day suspension for that charge should be reduced to a reprimand.

April 4, 2018
Harrisburg, Pennsylvania


Thomas P. Leonard, Esquire